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# Supreme Court of the United States

PHILIP MORRIS USA,

*Petitioner*,

*v.*

MAYOLA WILLIAMS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

## BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN INSURANCE ASSOCIATION, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICI[1]

Amici curiae National Association of Mutual Insurance Companies ("NAMIC"), American Insurance Association ("AIA"), and Property Casualty Insurers Association of America ("PCI") are three of the largest national trade associations of property and casualty insurers in the United States.

NAMIC is a full-service national insurance trade association with more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC members account for 44 percent of the homeowners market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through advocacy, public policy and member services.

AIA is one of the leading property-casualty insurance trade organizations, representing approximately 400 insurers that write more than $120 billion in premiums each year. AIA member companies offer all types of property-casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small business, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. AIA represents its members in every state and at the federal level in legislative, regulatory, and judicial forums.

PCI is one of the nation's premier insurer trade associations, representing over 1,000 companies that write 40.7 percent of the nation's automobile, homeowners,

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[1] Pursuant to *Supreme* Court Rule 37.6, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amici curiae and their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of this Court.

business, and workers compensation insurance. PCI serves as an advocate for the property/casualty insurance industry before state and federal policymakers; state and federal courts; key insurance industry, governmental, and business groups; the news media; and the public.

In this case, this Court has granted certiorari on two separate but related issues, namely whether due process permits a jury to impose punitive damages to punish the defendant for the effects of its conduct on nonparties, and whether the constitutional requirement that punitive damages be reasonably related to the harm to the plaintiff can be disregarded in cases where the court concludes there is extraordinary reprehensibility. Amici submit this brief to address the serious constitutional concerns raised by the first of these issues, the punishment of a defendant's conduct directed at nonparties.

Amici and their member companies have a substantial interest in this issue. Insurance companies (as members of a heavily regulated industry) often have similar or identically worded contracts with numerous consumers and often establish consistent policies and procedures for dealing with claims handling and other matters. Accordingly, the Oregon Supreme Court's ruling that a plaintiff may exact punishment not only for a defendant's conduct toward the plaintiff, but also for the defendant's similar conduct toward others, poses a grave concern to Amici and their member companies. This ruling lacks fundamental fairness both procedurally and substantively and, unless reversed by this Court, will establish a precedent that allows for the imposition of duplicative and grossly disproportionate punitive damage awards against insurance companies and other businesses.

## SUMMARY OF ARGUMENT

In its decision below, the Oregon Supreme Court held that a civil jury should be permitted to punish a defendant not only for conduct that was directed towards the plaintiff, but also for conduct that was directed toward or affected nonparties. Amici respectfully submit that this holding squarely conflicts with this Court's decisions in *State Farm*

*Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). This holding, if allowed to stand, would have a severe negative impact on insurance companies and consumers across the country.

While the Oregon Supreme Court's decision would affect businesses and defendants of all types, it raises issues of particular importance to the insurance industry. In the interests of fairness and efficiency, insurance companies commonly adopt standard policies and practices with regard to sales and claims handling so as to treat their policyholders and consumers in a similar fashion. The rule adopted below would work a vast expansion of liability for punitive damages, allowing a single jury to award a single plaintiff massive punitive damages for conduct towards other policyholders, whose claims are not before the court and who may intend to bring their own lawsuits or who may in fact have no complaint about, or no legal basis to question, the practice at issue. Not only would punitive damages awards based upon the Oregon Supreme Court's holding likely be enormous and unpredictable, but they would be duplicative as well. If each policyholder in a given state were empowered to collect punitive damages on the basis of theoretical harm to other policyholders in the state, then insurance companies could be forced to pay multiple punitive damages for the same alleged harms, contrary to fundamental principles of due process.

The Oregon Supreme Court's decision would also improperly transform civil juries into de facto state insurance regulators. The decision would expand the jury's role beyond that of fact finder with respect to a particular transaction between two parties, to that of an arbiter of unasserted and unproven hypothetical grievances of nonparties against insurance companies. This approach would in essence allow juries to regulate the conduct of insurance companies on a state-wide basis. Not only do lay juries lack the institutional competence and resources required for such broad regulatory judgments, but the States already have in place their own regulatory bodies dedicated to that policymaking role. Moreover, while States have been given broad authority to regulate the business of insurance,

they may not entrust that authority to juries in such a manner and to such an extent as to permit grossly excessive punitive awards that do not serve any legitimate state interest and that would improperly burden the business of insurance in violation of due process and the Commerce Clause.

For these reasons, and those set forth below, Amici respectfully submit that this Court should reverse the decision of the Oregon Supreme Court and clarify that, as a matter of due process, punitive damages may not be imposed to punish a defendant for conduct directed at nonparties.

## ARGUMENT

### I. THE RULE OF LAW ADOPTED BY THE OREGON SUPREME COURT, IF PERMITTED TO STAND, WOULD RESULT IN A VAST AND UNCONSTITUTIONAL EXPANSION OF PUNITIVE DAMAGES LIABILITY

#### A. The Oregon Supreme Court's Decision Directly Conflicts with this Court's Decisions in *Campbell* and *Gore*

In its decision below, the Oregon Supreme Court rejected Petitioner Philip Morris's argument that "*Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." *See* Petitioner's Appendix at 18a ("Pet. App. __"). The court so held despite the lack of any evidence at trial as to the individual circumstances of the thousands of unidentified individuals who the Oregon Supreme Court was willing to assume acted in reliance upon allegedly fraudulent statements in the defendant's advertising campaigns. *See id.* at 8a n.1.

In holding that *Campbell* does not prohibit punishment of a defendant's conduct towards nonparties, the Oregon Supreme Court approved the trial court's rejection of the jury

instruction proposed by Philip Morris that would have told the jury that punitive damages "should bear a reasonable relationship to the harm caused to" the plaintiff and that, although the jury could "consider the extent of harm suffered by others in determining what that reasonable relationship" was, the jury should not "punish the defendant for the impact of its alleged misconduct on other persons." *Id.* at 17a. The Oregon Supreme Court refused to accept the notion that harm to nonparties, while it may be relevant to evaluating the reprehensibility of a defendant's conduct under the first *Gore* guidepost, may not be directly punished through punitive damages. *See id.* at 18a n.3. The court stated: "It is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.*

The Oregon Supreme Court's decision, if followed in a lawsuit against an insurance company, would allow a civil jury, hearing a single case involving a single insured, to award damages punishing conduct of a defendant insurance company towards all other policyholders and/or consumers state-wide – persons not before the court and who have not been shown to have sustained any injury whatsoever. Given that insurance companies often have large numbers of policyholders in a state, the potential liability could be crushing – even where, and regardless of whether, the actual plaintiff sustained only minimal damages himself. It was precisely this need to prevent such disproportionate liability that was a fundamental consideration in this Court's decisions in *Campbell* and *Gore*.

In *Campbell*, this Court instructed that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered." *Campbell*, 538 U.S. at 426 (emphasis added). The Court's opinion in *Campbell* repeatedly makes clear that the harm *to the plaintiff* and the facts and circumstances of the defendant's conduct *to the plaintiff* must be the basis for the jury's award of punitive damages. *See, e.g., id.* at 425 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm *to the*

*plaintiff*.") (emphasis added). Accordingly, in *Campbell*, this Court specifically rejected the Utah Supreme Court's reasoning that the $145 million punitive award passed constitutional muster because, although the harm to the plaintiffs could be "'appropriately characterized as minimal,'" the harm was "'massive in the aggregate.'" *Id.* at 423 (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1149 (Utah 2001), *rev'd*, 538 U.S. 408 (2003)). Thus, although this Court's decision in *Campbell* was (given the facts of that case) concerned with the constitutional impropriety of punishing a defendant's dissimilar conduct toward nonparties, the principles articulated in *Campbell* that require that the constitutional punitive damages analysis be focused on the defendant's conduct toward the plaintiff and the harm caused to the plaintiff do not leave room for the punishment of conduct toward nonparties, regardless of whether the conduct is similar or dissimilar. The attempt by plaintiff in the case at bar to escape the constitutional limits on punitive damages awards by transforming the trial of her own claims into a trial designed to seek punishment for the defendant's similar course of conduct toward thousands of other persons does not pass constitutional muster under *Campbell*.

Indeed, even before *Campbell*, this Court emphasized that punitive damages must bear a reasonable relationship *to the plaintiff's* harm, not to harms allegedly suffered by non-parties not before the court. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (the Court's precedents require courts to evaluate "the relationship between the penalty and the harm *to the victim* caused by the defendant's actions") (emphasis added); *id.* at 440 (*Gore* requires examination of "the disparity between the harm (or potential harm) suffered *by the plaintiff* and the punitive damages award") (emphasis added); *see also Gore*, 517 U.S. at 580 (discussing "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages"); *id.* at 575 (condemning "the disparity between the harm or potential harm suffered *by Dr. Gore* and his punitive damages award") (emphasis added); *id.* at 581 (observing that in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the Court "relied on the difference between [the punitive damages] figure and the

harm *to the victim* that would have ensued if the tortious plan had succeeded") (emphasis added).

In *Campbell*, this Court identified two related concerns in particular that require that a punitive award bear a reasonable relationship to the harm to the plaintiff. First, the Court emphasized that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . ." *Campbell*, 538 U.S. at 423. Second, the Court noted "the possibility of multiple punitive damages awards for the same conduct" created by punishment on the basis of conduct toward nonparties, as "in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.*

The Oregon Supreme Court gave an improperly narrow reading to this Court's words, confining the application of this Court's admonition that the courts should not "adjudicate the merits of hypothetical claims against a defendant under the guise of the reprehensibility analysis" to "hypothetical claims" based upon *dissimilar* conduct. Pet. App. 19a ("We think that Philip Morris takes the foregoing quoted material from *Campbell* out of context. The quote referred only to *dissimilar* acts and dissimilar claims.") (emphasis in original). That narrow reading is not supported by this Court's decision in *Campbell* and is adverse to the constitutional concerns underpinning this Court's due process punitive damages jurisprudence.

Contrary to the Oregon Supreme Court's decision, the fundamental due process concerns raised by a court's attempting to adjudicate the merits of the hypothetical claims of nonparties are present whether those hypothetical claims are based upon dissimilar conduct or similar conduct. Those concerns are both procedural and substantive and include the impossibility of a defendant's having a fair and adequate opportunity to defend against the hypothetical claims of nonparties by exploring in discovery and at trial the individual facts and circumstances relevant to the purported claims of such persons, as well as the fundamental unfairness of basing a punitive award on what must amount to speculation and conjecture – as the Oregon courts and jury

did in this case.

The Oregon Supreme Court's ruling that it is permissible to impose punitive damages to punish a defendant for its conduct to nonparties is incompatible with the fundamental constitutional requirement of proportionality. As this Court stated in *Gore*, "[t]he principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'" 517 U.S. at 575 n.24 (citation omitted). In the context of punitive damages in civil cases, this Court's jurisprudence makes clear that this principle requires that a punitive damages award be proportional to the specific harm caused to the plaintiff in the case by the defendant's conduct. *See Campbell*, 538 U.S. at 426. Proportionality in civil cases is protected and furthered by the ratio guidepost. *See id.* at 425-26.

Significantly, as the Oregon Supreme Court conceded, punishment of conduct directed toward nonparties can only occur if the ratio guidepost is disregarded. *See* Pet. App. 31a (acknowledging that "the ratio guidepost considers only harm to the plaintiff" and "is not met"). Moreover, the lack of proportionality approved by the Oregon Supreme Court in the case at bar is twofold. As the court concedes, there is no proportionality between the plaintiff's harm and the punitive award. There was also no possible check on proportionality between the purported harm to the thousands of unidentified Oregonians that the jury was encouraged to punish and the amount of punitive damages that the jury concluded was appropriate to punish that putative harm. No entitlement to compensatory damages was established by or on behalf of such persons, and the extent of the purported harm to them was not (and could not be) determined.[2] Thus, the Oregon

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[2] For this reason, courts in class action litigation have disallowed plaintiffs' attempts to have a jury award punitive damages for the class before issues of liability and compensatory damages are decided, as violative of the proportionality requirement. *See, e.g., In re Baycol Prods. Litig.*, 218 F.R.D. 197, 215-16 (D. Minn. 2003) (disapproving class trial plan that called for a class-wide trial on punitive damages followed by individual class members' trials for compensatory damages). *See also In re Simon II Litigation*, 407 F.3d 125, 138-39 (2d Cir. 2005) ("In certifying a class that seeks an assessment of punitive damages prior

jury was permitted unlimited, directionless discretion in fixing the amount of the punitive award.

The Oregon Supreme Court professed confusion as to how it is possible to take harm to others into account in gauging reprehensibility without directly punishing for it. Pet. App. 18a n.3. But that may be a reason for declining to allow this kind of collateral evidence to infect the jury at all, not for allowing the jury to punish the defendant for it as if the case were a class action.[3]

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to an actual determination and award of compensatory damages, the district court's Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms"; under *Campbell*, a punitive damages award in a class action may not "include punitive damages due to outrageous conduct by defendants towards non-class members").

[3] It merits mention that, although the Court has at times suggested that prior conduct directed at nonparties may be relevant to determining the reprehensibility of the conduct directed at the plaintiff, the Court has made clear that "courts must ensure the conduct in question replicates the prior transactions." *Campbell*, 538 U.S. at 423. As the Eighth Circuit explained, "[i]n determining what conduct constitutes a previous example of the same conduct . . . we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). To avoid that, "the relevant behavior must be defined at a low level of generality." *Id.* This is particularly true when the defendant is a large business or corporation. It is the nature of the insurance business and of many other consumer-oriented businesses to engage in repeated similar transactions with consumers. As with the practice at issue in *Gore* (not informing consumers that minor cosmetic damage on a car was repaired before sale), a practice may appear "reprehensible" to a plaintiff and his lawyer but may have been reasonably believed by the defendant to be lawful and appropriate. *See Gore*, 517 U.S. at 578 (noting that BMW's "decision to follow a disclosure policy that coincided with the strictest extant state statute" was not sufficiently reprehensible to justify the punitive award in that case). Likewise, the plaintiffs in *Campbell* presented to the jury as "reprehensible" many different insurance practices that were in fact

In any event, the distinction that the Oregon Supreme Court found so elusive is one that has been drawn by both this Court and other state supreme courts. In *Gore*, for example, this Court held that, although the jury was entitled to consider that the conduct at issue affected approximately 1,000 other car purchasers nationwide in determining the degree of reprehensibility of that conduct, the jury could not punish directly for the harms to those purchasers. 517 U.S. at 568-74 & n.21.

More recently, the California Supreme Court explained in *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191 (2005) that,

> To consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense . . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.

*Id.* at 1206 n.6.

This Court in *Campbell* reiterated that there can be no "bright-line" constitutional limits on the ratio between compensatory damages and punitive damages. *Campbell*, 538 U.S. at 424-25. Indeed, reprehensible conduct may vary from contemptible to extremely egregious, warranting punitive damages awards in different amounts. Depending upon where on the range of reprehensible conduct the defendant's conduct falls and upon the amount of compensatory damages, a constitutionally permissible ratio of punitive damages to compensatory damages may vary from a 1 to 1 (or even smaller) ratio to a 9 to 1 ratio. What

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lawful and even approved practices in the states where they occurred. *See Campbell*, 538 U.S. at 422. Thus, even the limited use of "repeated conduct" in the reprehensibility analysis requires restraint and wisdom on the part of juries and courts.

*Campbell* suggests is that a jury may consider harm to nonparties but (if at all) only for the purpose of ascertaining the level of reprehensibility of the defendant's conduct and only if the conduct being punished "replicates the prior transgressions." *Id.* at 423. At all times, however, a punitive damages award must bear a reasonable relationship to the harm caused to the plaintiff and to the general damages recovered. *See id.* at 426 ("courts *must* ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered") (emphasis added). If the defendant acted with extreme reprehensibility and compensatory damages are not "substantial," a punitive damages award at the high end of single digit ratios may be appropriate. Conversely, if the defendant's reprehensibility is not extreme or extraordinary, a ratio of 1 to 1 or less may be appropriate. But in no event, under *Campbell*, can a plaintiff in one case be awarded punitive damages for conduct directed at nonparties.

Amici respectfully submit that the Court should reaffirm the fundamental distinction between considering conduct directed at nonparties as bearing on reprehensibility, and directly punishing that conduct – which is plainly impermissible under this Court's decisions in *Campbell* and *Gore*. The preservation of this simple, yet fundamental, distinction is crucial to the insurance industry in this country – and to the continued availability of affordable insurance to millions of consumers nationwide.

### B. The Oregon Supreme Court's Decision Would Subject Insurance Companies and Other Businesses to Duplicative and Grossly Disproportionate Punitive Damage Awards

The Oregon Supreme Court's decision not only is contrary to this Court's plain dictates in *Campbell* and *Gore*, but also raises the specter of unconstitutionally duplicative and disproportionate punitive damages awards. This danger is magnified in the context of the insurance industry, where heavy state regulation means that similar sales and claims handling policies and practices are typically followed with respect to transactions with consumers.

It is common and necessary practice by insurance companies to adopt broad standard procedures with respect to policyholders and insureds. In order to treat their consumers in a similar fashion, insurance companies typically implement standard polices and practices with regard to sales and claims handling. Under the rule adopted by the Oregon Supreme Court, the use of such standard practices could expose insurance companies to grave risks of duplicative and disproportionate liability for punitive damages for conduct directed to nonparties.

The rule of law adopted by the Oregon Supreme Court, if allowed to stand, would create precisely the risk of duplicative punitive damages awards that this Court cautioned against in *Campbell*. As this Court observed in *Campbell*, punishment on the basis of "other parties' hypothetical claims against a defendant" creates the possibility that punitive damages will be repeatedly collected by different plaintiffs for the same harm to the same persons. *Campbell*, 538 U.S. at 423 ("[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains") (citing *Gore*, 517 U.S. at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or

punitive, damages that subsequent plaintiffs would also recover")).

This danger of duplicative punishment has been recognized by numerous courts and commentators. As one commentator has observed,

> [The] practice of punishing the defendant, in a single case brought by a single victim, for the full scope of societal harm caused by its entire course of wrongful conduct . . . has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 587 (2003) (herein cited as Colby, "*The Multiple Punishment Problem*"); *see also* Dennis N. Jones, *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 3-4 (1991).

Similarly, the Eighth Circuit in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), aptly explained that:

> In [*Campbell*], the Supreme Court emphasized that courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer. Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative

punitive damages award.

*Id.* at 797.

For insurance companies as for other closely regulated consumer-oriented businesses, the Oregon Supreme Court's disregard of this risk of duplicative punishment could have significant negative implications. Because most insurance company policies and practices are implemented on at least a state-wide basis, each consumer in a given state could bring a suit and individually collect damages on the basis of hypothetical harms caused to numerous other consumers in the state – all of whom would remain free to bring their own suits (or none of whom may feel they were harmed).

The unfairness and injustice of subjecting civil defendants to the threat of successive, duplicative liability is beyond dispute. *See* Colby, *The Multiple Punishment Problem*, 87 Minn. L. Rev. at 597. As one commentator has observed:

> In the criminal context, this unfairness is obviated by the law of double jeopardy. The Double Jeopardy Clause "serves the function of preventing both successive punishment and successive prosecution" . . . . In the civil law, where the Double Jeopardy Clause has no application to litigation between private parties, the fear of unfair multiple bites at the same apple generally finds expression in the doctrine of res judicata.

*Id.* (citation omitted). However, res judicata would not protect defendants against successive suits by different plaintiffs, seeking to collect punitive damages for the same "hypothetical claims" of the same nonparties. *See Campbell*, 538 U.S. at 423. Nor would it protect a defendant, if one of the nonparties, whose harm has already been punished by a large punitive award to another plaintiff, decided to press his own claims for compensatory and punitive damages.

In addition, there is a fundamental element of unfairness in allowing a defendant to be punished for harms to persons who have not established their entitlement to compensatory damages and without having an adequate opportunity to

defend itself. "When a defendant engages in a course of conduct that allegedly harms a large number of people, many of the alleged victims, if they bring their own lawsuits, will not prevail, or perhaps will be unable to convince the jury that the defendant's conduct was sufficiently malicious to warrant the imposition of punitive damages." Colby, *The Multiple Punishment Problem*, 87 Minn. L. Rev. at 596. Likewise, under the Oregon Supreme Court's decision, defendants would be effectively stripped of the opportunity to assert individual affirmative defenses (*e.g.*, statute of limitations) or argue that a specific individual could not prove the elements of his or her claim (*e.g.*, actual damages, reasonable reliance). *See id.* at 601. This approach is contrary to the fundamental due process right of defendants to have "an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

Not only would the Oregon Supreme Court's decision expose insurance companies to duplicative punitive damage awards, but each such award would also be grossly disproportionate to the harm suffered by the plaintiff in the case before the court. This Court has expressed its concern about punitive damages "run wild." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). And nowhere have the effects of this punitive damages explosion been felt more than in the insurance industry, whose members face a higher risk of excessive awards than any other industry. *See* Eric Moller, *at al.*, *Punitive Damages in Financial Industry Verdicts* 24 (RAND Institute for Civil Justice 1997) ("juries in insurance cases tend to reach higher punitive damage awards relative to the compensatory damages awarded than those hearing other types of cases").

The Oregon Supreme Court's decision will only exacerbate this crisis, at the expense not only of the insurance industry, but also of consumers and policyholders nationwide. The fact that insurance companies generally adopt standard sales and claims handling practices would likely make the industry a target for attorneys pressing questionable, small damages claims, in the hopes of scoring a punitive damages jackpot. The costs of defending such suits, not to mention the potentially massive liability of even a single disproportionate punitive damages award, would

inevitably affect the cost and availability of insurance coverage for millions of Americans.

Indeed, the Oregon Supreme Court's decision, if followed, could be used by plaintiffs' counsel to attempt to turn virtually any consumer suit against an insurance company into a "bet-the-company" proposition. Any such suit, no matter how small the compensatory damages involved and how minor the injury to the plaintiff, could potentially produce a large punitive award geared not to the plaintiff's harm, but to the number of policyholders state-wide presumed to have been affected by the defendant's conduct.

Accordingly, under the regime that would be created by the Oregon Supreme Court's decision, it is very likely that duplicative and grossly disproportionate punishments would be imposed upon insurance companies, in violation of this Court's admonition that punitive damages be both "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426. Amici respectfully submit that this Court should provide the necessary guidance to prevent this unconstitutional result, which could be devastating both to insurance companies and to their consumers.

### C. The Oregon Supreme Court's Decision Would Subject Insurance Companies and Other Businesses to Arbitrary and Unpredictable Punitive Damage Awards

As this Court stated in *Campbell*, "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" *Campbell*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574).[4] Thus, in *Campbell*

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[4] *See also Gore*, 517 U.S. at 585 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in

and *Gore*, this Court sought to bring predictability and rationality to the process by which punitive damages are awarded in this country. The decision below undermines that effort, subjecting insurance companies and other large corporate defendants to enormous, unpredictable, and arbitrary punitive awards.

This Court has observed that "'[p]unitive damages pose an acute danger of arbitrary deprivation of property.'" *Campbell*, 538 U.S. at 417 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). Whereas due process "prohibit[s] the imposition of grossly excessive or arbitrary punishments on a tortfeasor," *Campbell*, 538 U.S. at 416, the Oregon Supreme Court's decision virtually guarantees the imposition of such excessive and arbitrary punishments, by allowing punitive damages to be imposed for conduct directed not only toward the plaintiff but toward nonparties as well.

The Oregon Supreme Court's decision represents a radical departure from the protections inherent in the traditional litigation model and creates an unreasonable risk of arbitrary punitive awards. In traditional litigation, the "jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 141 (1986). Thus, "[a]lthough not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry" that served to anchor punitive damages to the underlying claims and injuries of the particular plaintiff at issue. *Id.*

In this case, the Oregon Supreme Court improperly approved a procedure that permitted the jury to impose punitive damages on Philip Morris not only for its conduct toward plaintiff's decedent but also for its conduct directed at thousands of other unidentified individuals across the State of Oregon. The precedent set by the Oregon Supreme Court,

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the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.")

if allowed to stand, would subvert the central due process requirements of fairness, proportionality and reasonableness and expose corporations and businesses to vast and unbounded punitive awards.

Even under the traditional litigation model, the consistency and rationality of juries' punitive damage awards has repeatedly been called into question. *See* Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, *Punitive Damages: How Juries Decide* (2002). Numerous studies have shown that, as a result of common cognitive biases, juries do not reach reliable, consistent conclusions as to the proper size of punitive damages awards. Thus, although jurors show remarkable consistency in ranking the "outrageousness" of wrongful conduct on a bounded scale (*e.g.*, a scale of one to ten), their translation of such rankings into dollar punitive awards is enormously variable and unpredictable. *See id.* at 29-32. This wide variability would be severely exacerbated if, as the Oregon Supreme Court would allow, juries are asked to consider and punish not simply the defendant's conduct toward the plaintiff, but also conduct directed toward nonparties whose purported claims are not before the court and cannot be adequately subjected to the fact-finding process.

Through its decisions in *Campbell* and *Gore*, this Court sought to bring a measure of predictability and restraint to, and reduce the arbitrariness of, punitive damages awards. The Court sought to achieve this result in part by tethering punitive damage awards to the conduct affecting and the actual harm sustained by the particular plaintiff. Amici respectfully submit that the approach taken by the Oregon Supreme Court erroneously sets aside "well-established constraints on punitive damages," *Campbell*, 538 U.S. at 427, and provides new occasion for arbitrary and unpredictable punitive awards.

## II. THE RULE OF LAW ADOPTED BY THE OREGON SUPREME COURT WOULD IMPROPERLY TRANSFORM CIVIL JURIES INTO DE FACTO REGULATORS OF INSURANCE COMPANIES AND OTHER BUSINESSES

The Oregon Supreme Court's decision would improperly expand the role of civil juries from factfinders with regard to a particular plaintiff's claims to de facto state insurance regulators. Allowing a jury to serve as an arbiter of unasserted and unproven hypothetical grievances of nonparties against insurance companies increases the chances for arbitrary and unpredictable results and punishments. Lay juries lack the expertise, resources, experience and statutory authority required for such broad regulatory judgments. Moreover, entrusting juries with what are in essence wide-ranging legislative or regulatory determinations and permitting juries to assess state-wide practices and conduct raises the risk that defendants will face large punitive awards without fair notice either that the conduct in question was subject to punishment or of the severity of the potential penalty. *Cf. Campbell*, 538 U.S. at 417 (due process requires "'that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose'") (citation omitted).

Permitting juries to regulate through the imposition of punitive damages raises other constitutional concerns as well. Each state has been delegated authority to regulate the business of insurance within its boundaries. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) ("States, as a matter of tradition and express federal consent, have an important interest in maintaining precise and detailed regulatory schemes for the insurance industry"). However, no state has a legitimate interest in delegating to its civil juries the power to regulate insurance company conduct through the imposition of arbitrary and excessive punitive damage awards. *See Campbell*, 538 U.S. at 417-18 (quoting *Pacific Mut. Life Ins.*

*Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)) ("'[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. . . . A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim.'").

As this Court has recognized, the business of insurance is interstate commerce. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 545-46 (1944). Insurance companies, like other large corporations, are "active participants in the national economy" and that status "implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." *Gore*, 517 U.S. at 585. A punitive damages award should not be "so large as to 'implicate[] th[at] federal interest.'" *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1338 (11th Cir. 1999) (quoting *Gore*, 517 U.S. at 585). A rule that permits juries to punish conduct that is not directed toward the plaintiff is likely to result in awards that "express biases against big businesses, particularly those without strong local presences," *Campbell*, 538 U.S. at 417 (citation omitted), even if that conduct is similar to the conduct that forms the basis of the plaintiff's claims and even if the conduct punished is limited to in-state conduct. The risk that juries will be improperly influenced to impose large awards on out-of-state corporations is even greater where (as in the case at bar) the defendant's net worth is a "focal point" of the plaintiff's punitive damages presentation. *See* Pet. at 27.

The Oregon Supreme Court has licensed Oregon juries to exact enormous punitive damages awards from large corporations, unfettered by traditional constraints of proportionality. Such awards impermissibly threaten the "maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce," *Gore*, 517 U.S. at 517-72 (citation omitted), in violation of due process and the Commerce Clause.

## CONCLUSION

For the foregoing reasons, Amici respectfully submit that this Court should reverse the decision of the Oregon Supreme Court and clarify that, as a matter of due process, punitive damages may not be imposed on a defendant for conduct directed at nonparties.

Respectfully Submitted,

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